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In the Supreme Court of the United States

OCTOBER TERM 1950

No. 313

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL RICE MILLING COMPANY, INC., *et al.*

Brief of Di Giorgio Fruit Corporation As Amicus Curiae

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STATEMENT

We file this brief because *Di Giorgio Fruit Corporation v. National Labor Relations Board*, now pending, and numbered 10,605, in the Court of Appeals for the District of Columbia Circuit, involves a question like that presented in the instant case.[1] Inasmuch as this Court's decision in the

[1] A teamsters' union picketed the Di Giorgio ranch for recognition as the collective bargaining representative of certain agricultural laborers. When truck drivers employed by neutral trucking concerns sought to enter the premises for the purpose of making pick-ups or deliveries, they were threatened by the pickets with loss of

instant case will inevitably affect Di Giorgio Fruit Corporation's rights in its own controversy, Di Giorgio Fruit Corporation has almost as much of an interest in the instant case as it does in its own.

STATUTORY PROVISION INVOLVED

The controlling statutory provision is Section 8(b)(4)(A) and (B) of the National Labor Relations Act (61 Stat. 136; 29 U.S.C. Supp. III, sec. 151, et seq.). However, a proviso appearing at the end of Section 8(b)(4) also is highly significant. Section 8(b)(4) in its entirety reads as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
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> • • • • • • •
>
> "(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such

their union membership. One truck driver who persisted in passing the picket line was fined $1000, and the fine was publicized at the next membership meeting. The Board held that this conduct did not violate Section 8(b)(4)(A) of the Act because it was "primary in character." 87 NLRB No. 125.

labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;"

THE FACTS

The pertinent facts are simple and undisputed.

The Teamsters' Union picketed a mill operated by Kaplan Rice Mills to obtain recognition as the collective bargaining representative of employees of the mill (R. 66-67, 69). The Kaplan employees did not go on strike (R. 67), and there is no claim that the Union in fact represented them or was entitled to certification as their representative (R. 63).

Sales and Service House, a firm engaged in the business of selling feed and grain, had been purchasing various com-

modities from Kaplan (R. 61). When truck drivers employed by Sales and Service House called at the Kaplan mill to pick up some purchases of rice or bran, they were stopped by the pickets and were told that they could not enter the mill because there was a strike on (R. 69). When the truck drivers persisted in entering the mill they were stoned by the pickets (R. 70).

THE PROCEEDINGS BELOW

The Trial Examiner, in respect to the foregoing activities of the Union, found and concluded as follows (R. 79-80):

> "* * * The entire incident clearly establishes that the respondent, again in the words of the Act did 'induce or encourage the employees' of the Sales House, a neutral to the primary labor dispute between the respondent and the complainants, 'to engage in, a strike or concerted refusal in the course of their employment to . . . transport or otherwise handle or work on any goods, articles, material, or commodities or to perform any services' with the avowed object, as shown by Kuhns' testimony, (1) of 'forcing or requiring' the Sales House 'to cease . . . handling, transporting, or otherwise dealing in the products of' Kaplan or 'to cease doing business with' Kaplan and (2) of 'forcing or requiring' Kaplan 'to recognize or bargain with' the respondent as 'the representative of' Kaplan's employees at a time when the respondent was not a certified representative of such employees. The fact that the respondent was not ultimately successful in its attempt to dissuade the drivers of the Sales House from entering Kaplan's mill is immaterial. Inducement or encouragement of the Sales House employees is clearly shown. The undersigned finds that by this conduct the respondent violated Section 8(b), subsections (4)(A) and (4)(B) of the Act."

The Board reversed the Trial Examiner, holding as follows (R. 55):

> "The Trial Examiner also found that the Respondent violated Section 8(b)(4)(A) and (B) by attempting to prevent a Sales House truck from entering the Kaplan mill on October 21, 1947. We do not agree with this finding. The Respondent's activities arose out of the *primary* picketing of the Kaplan mill, and were carried out in the immediate vicinity of that mill. . . ."

The Court of Appeals adopted the Trial Examiner's view of the matter and vacated the Board's decision. It said (R. 95-96):

> "The statute clearly provides a remedy for the type of conduct engaged in by the union, without resort to any distinction between primary and secondary activities. If the union's activities come within the language of the statute, they constitute an unfair labor practice, regardless of whether they might have been considered a true 'secondary boycott' under the old common law or under any of the modern and popular theories. . . .
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> • • • • • • •
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> ". . . We do not think the ends of justice will be best served if we allow the Board to overturn this finding merely because it considers all the activities to be primary instead of secondary. It seems to us that these activities become secondary when the strikers attempted to induce and encourage the employees of this neutral employer Sales House. . . ."

THE QUESTION

It may be conceded that the Union, in attempting to gain recognition from Kaplan, had a right to picket the Kaplan mill for the purpose of inducing strike action by Kaplan employees. It may also be assumed for present purposes

that such picketing is not rendered unlawful by the fact that it has the purely incidental and unintended effect of dissuading employees of others from entering the premises. Here, however, we are not concerned with a purely incidental effect. Here the pickets engaged in conduct aimed unequivocally and exclusively at employees of another concern seeking to do business with Kaplan. The question thus presented is as follows:

Whether a union ineligible for certification which pickets an employer for recognition commits an unfair labor practice when its pickets, by conduct aimed unequivocally and exclusively at employees of a neutral employer, encourage such employees to engage in a concerted refusal to enter the picketed premises on their employer's business.

ARGUMENT

I. The Conduct of the Union Was Exactly That Which Section 8(b)(4)(A) and (B) in Plain Terms Prohibits.

The Act does not use the terms "primary" and "secondary," but provides in plain terms that it shall be an unfair labor practice for a union,

> "* * * to engage in, or to induce or encourage the employees of any employer to engage in, * * * a concerted refusal in the course of their employment to * * * transport * * * any goods, articles, materials, or commodities, or to perform any services, where an object thereof is: (A) forcing or requiring any employer * * * to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 * * *."

This is exactly what the Union did. It encouraged the employees of Sales House to engage in a concerted refusal in the course of their employment to transport goods and to perform services, an object being to force and require Sales House to cease doing business with Kaplan. Furthermore, the ultimate object was to force Kaplan to recognize a union which had not been certified as the representative of Kaplan's employees.

The only qualification of the sweeping prohibition of Section 8(b)(4)(A) and (B) is that contained in the proviso which appears at the end of Section 8(b)(4) and which reads as follows:

> "Provided, that nothing contained in this subsection (b shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;"

The Board cannot rest its case on the foregoing proviso for the reason that it plainly is inapplicable. In the first place, the employees of Kaplan were not engaged in a strike. In the second place, the Union was not a representative of such employees whom Kaplan was required to recognize. And, finally, the proviso relates only to a refusal to enter struck premises and not to the inducement or encouragement of such a refusal[2].

Nevertheless, the Board has concluded that the Union's

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[2]Congress, in the limited circumstances set forth in the proviso, made allowance for the fact that union members generally are reluctant to enter struck premises.

conduct hereinabove mentioned was permissible because "carried out in the immediate vicinity" of the Kaplan mill. Thus the Board, as it has done in certain other cases,[3] has held the Union's conduct lawful because carried on in geographical proximity to the situs of the primary dispute. However, the statute itself does not recognize geography as affecting the lawfulness of questioned conduct excepting in the case covered by the proviso above quoted.

It is a fact therefore that the Board, in holding proper the conduct of the Union in encouraging the employees of Sales House to refuse to enter the Kaplan mill, has created an exception to the statutory prohibition which is not to be found in the language of the statute itself and which cannot be reconciled therewith.

II. The Proviso to Section 8(b)(4) Shows That Congress, in Enacting the Prohibitions Contained in That Section, Had Specifically in Mind Situations Like the Present.

It cannot be contended that Congress's choice of language prohibiting conduct like that involved in the present case was the result of carelessness, for the proviso at the end of Section 8(b)(4) shows very clearly that Congress had specifically in mind situations involving refusal of employees of one employer to enter upon the premises of another where a strike exists and that it deliberately chose to except such situations from the prohibitions of the section only in circumstances which do not exist in the present case.

In seeking to avoid the foregoing conclusion, the Board argued below[4] that since the proviso by its terms qualifies

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[3] See, e.g., *Matter of Electrical Workers and Ryan Construction Corporation*, 85 NLRB 417, and dissent therein of Board Member Gray.

[4] Board's brief below, page 23, note 14.

all of the provisions of "this subsection b" it does not relate particularly to the secondary strike provisions of subdivisions (4)(A) and (B) and may have been adopted for the reason that the conduct to which it relates would otherwise be rendered unlawful by some provision of Section 8(b) other than subdivisions 4(A) and (B). This contention is entirely inconsistent with both the history and content of the proviso.

In the first place, it is apparent from the legislative history that the proviso was aimed primarily at paragraph (4) of Section 8(b) and was not adopted because of any compelling need to qualify paragraphs (1), (2), (3), (5) or (6). We say this because the proviso had its source in the Senate bill (S. 1126), and in that bill as reported from committee and as originally passed by the Senate[5] the proviso, by its terms, related only to paragraph (4) (Leg. Hist. pp. 114, 241).[6] Paragraphs (1), (2), (3), (5) and (6), although all but the last were contained in the bill, were not mentioned in the proviso, and the proviso was not broadened so as to refer to these subdivisions until conference (House Conf. Rep. No. 410, p. 7; Leg. Hist. p. 511). In short the proviso was aimed primarily at paragraph (4) and was broadened to refer to the other provisions as well only as an afterthought. This history explains why the proviso appears at the end of paragraph (4) in the middle of subsection (b) rather than at the end of the subsection.

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[5]While the bill passed by the Senate was designated H.R. 3020, the language of the Senate bill had been substituted for that of the House bill. 93 Cong. Rec. 4999; Leg. Hist. 1438.

[6]The citations of "Leg. Hist." refer to the Legislative History of the Labor-Management Relations Act of 1947, a compilation of the bills and legislative reports and debates published by the National Labor Relations Board in 1948.

Not only is it true that the proviso was inserted primarily to qualify paragraph (4), but it also seems plain from its content that it was directed particularly at subdivisions (A) and (B) the secondary strike provisions. We say this because the content of the proviso is peculiarly related to the content of those subdivisions, and for the further reason that its content is such that it does not in fact qualify subdivision (C) and would qualify subdivision (D) only in unusual circumstances. It does not in fact qualify subdivision (C) because that subdivision applies only to a strike where another union has been certified and where the employer therefore is *not* required to recognize the striking union, whereas the proviso applies only where the striking union is entitled to recognition. Similarly, it would be an unusual case in which a strike prohibited by subdivision (D) would be one sponsored by a union which the employer is required to recognize. The content of the proviso relates solely to secondary strike activity (refusal of an employee of one employer to enter upon the premises of another employer where a strike exists) and thus is related directly and peculiarly to the subject matter of the prohibitions of secondary strike activity in subdivisions (A) and (B).

We submit that the proviso clearly demonstrates that Congress had specifically in mind situations like the present and that its selection of language which in plain terms prohibits conduct like that here involved was not inadvertent.

III. The Board's Error Lies in Substituting Its Own Concept of Secondary Activity for the Congressional Concept as Expressed in the Language of the Act.

Because it was the Congressional purpose to prohibit various kinds of conduct loosely characterized in the debates as "secondary" strikes and boycotts, the Board has based its decisions in this and other cases upon its own notion of what is "primary" and what is "secondary" rather than upon the Congressional concept as expressed in the plain language of the statute.[7] The Board thus has relied upon the legislative history to overcome the plain words of the statute, a procedure which this Court has repeatedly condemned. See *Ex Parte Collett*, 337 U.S. 55, 61.

The fact is, of course, that Congress did not leave it to the Board or to the courts to indulge their own notions of what constitutes secondary activity, but itself spelled out what it wanted to prohibit. The fact that the conduct here in question does not conform to the Board's concept of secondary activity is immaterial, for it is the Congressional concept as spelled out in the statute that is controlling.

The Board argued below that in times past no court ever regarded conduct like that here in question as constituting secondary activity. It may be doubted that this is true.[8] But in any event Congress, in enacting the statute, pointedly

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[7] As demonstrated by the several cases now pending in this Court, men have varying ideas as to what constitutes a "secondary boycott." The Restatement of the Law of Torts does not use the phrase because of its uncertain meaning. Restatement of Torts (1939), Chapter 38, Topic 4 Scope Note.

[8] For example in *C. S. Smith Met. Market Co. v. Lyons* (1940), 16 C.(2d) 389, where pickets seeking recognition from an employer turned away from the picketed premises truck drivers employed by neutral employers, the court justified this conduct upon the ground, among others, that it is "the established law of this state that the secondary boycott is a form of economic pressure which labor organizations may properly employ * * *." 16 C.(2d) at 395.

refrained from use of the word "secondary" and from thus limiting the statutory prohibition to any pre-existing concept of secondary activity.[9] The proviso hereinabove mentioned at the end of Section 8(b) is illustrative of the fact that Congress had no intention of hewing to any line theretofore drawn, for certainly no pre-existing legal rule or theory ever made the legality of conduct attacked as secondary depend upon whether the primary strike was ratified or approved by a union whom the employer was required to recognize under the National Labor Relations Act.

Congress, after lengthy consideration and a great deal of attention to language, enacted a statute which prohibits certain carefully described conduct. The Board, instead of applying the Congressional language, has substituted other phrases and has then reasoned from them as if they were in the statute. The result is that it has been deciding cases entirely without reference to the statutory language.[10] It was of this kind of approach that Mr. Justice Holmes was speaking when he said:

> "Much trouble is made by substituting other phrases assumed to be equivalent [to the statutory language], which are then reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used."
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> (Dissenting opinion in *Northern Securities Co. v. United States*, 193 U.S. 197, 403.)

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[9] "The statute * * * does not use the terms 'hot cargo,' 'picketing the product,' or 'secondary boycott.' It broadly sweeps within its prohibition an entire pattern of industrial warfare deemed by Congress to be harmful to the public interest." *Printing Specialties and Paper Converters Union v. Le Baron* (C.A. 9th), 171 F.(2d) 331.

[10] For example, in the present case the Board, in rendering its decision, made no reference to the language of the Act.

The Board treats Congress like a backward child judged to be incapable of saying what it means or of really meaning what it says. The result is that in the present case, as in others, the Board holds conduct to be proper which Congress, in plain words, has said shall constitute an unfair labor practice.

IV. The Board's Argument That Application of the Statute as Written Would Outlaw Primary Strikes Is Specious.

In opposing application of the statute as written, the Board argued below that Section 8(b)(4)(A) should not be read literally because a literal reading would forbid all primary, as well as secondary, strikes and picketing, since even a primary strike "has as 'an object thereof' to cause the employer to 'cease doing business' with another person."[11]

But that argument involves a strained, not a literal, reading of Section 8(b)(4)(A), and is specious. The 'object' of a strike is to enforce the union's demand against the struck employer. *Restatement of the Law of Torts, sec. 777.* In the case of a secondary strike, the union's demand of the struck employer, express or implicit, is that he cease doing business with another person upon whom the union desires to bring economic pressure. In the case of a primary strike, the union's demand of the struck employer is that he grant recognition, or improved wages, hours, or working conditions. In short, in the case of a primary strike, the concession sought to be obtained from the struck employer, and hence the *object* of the strike, is, not that he cease doing

[11] Board's brief below, page 9. It is the Board's thought that an object of a primary strike is to bring the employer's business to a halt and, thus, to force him to cease doing business with others.

business with someone, but that he grant recognition, or improvements in wages, hours or working conditions.

The context of Section 8(b)(4)(A) leaves no doubt that the word "object," in reference thereto, was used in the sense above mentioned. In other words, inducement or participation in a strike is rendered an unfair labor practice by that Section only if the demand made upon the struck employer, express or implicit—and hence the object of the strike—is that the employer cease doing business with another person or cease using, selling, handling, transporting, or otherwise dealing in the products of another producer, processor, or manufacturer.

In reference to Section 8(b)(4)(B), the word "object" has a somewhat different connotation; but this again is clear from the context. In (B), by plain terms, the legality of the strike is made to depend upon whether it is in support of a demand for a particular concession—that is, recognition—from an employer other than the one struck.

All of the foregoing is clear from the context. A sensible reading of the provisions does not outlaw a strike in support of a demand upon the struck employer for recognition, or improved wages, hours or working conditions (i.e., a primary strike); nor does such a reading involve any other results which are absurd or of doubtful constitutionality. Such results can be obtained only by straining the language of the Section and furnish no justification for abandoning that language in favor of phrases not to be found in the Act.

V. The Board's Disregard of the Statutory Language Has Led to Results as Varied as Different Men's Notions of a Secondary Boycott.

As heretofore noted, the Board in the present case gave controlling significance to the fact that the Union's activities "were carried out in the immediate vicinity of the mill." One might suppose from this that if activities designed to induce a refusal of service had been carried on at a place distant from the mill, the Board would have reached a different result. A reference to other cases, however, will reveal that this is not so and that the Board, by ignoring the language of the statute, has involved itself in numerous inconsistencies and contradictions.

In the case of *Di Giorgio Fruit Corporation*, the pertinent facts of which are stated at page 1, *supra*, note 1, refusal of truck drivers employed by neutral trucking concerns to enter the picketed premises was induced, in part at least, by fining one of them who passed the picket line $1000 and by publicizing this fine at the next membership meeting. The union's conduct in imposing and publicizing the fine took place many miles away from the picketed premises, but the Board nevertheless held the union's conduct to be lawful. The Board attempted to justify this decision by asserting that the locality of the refusal to perform services, rather than the locality of the inducement, is the determining factor, and, therefore, that inducement of a refusal to perform services is permissible no matter where the inducement takes place so long as the refusal thus induced "is confined to the situs of the primary dispute." (Brief in Court of Appeals, p. 58).

In reaching the foregoing conclusion, the Board apparently conceded that if the union had induced "employees

not to ship to Fruit Corporation at the point of the shipment," its conduct would have violated the statute (Brief in Court of Appeals, p. 59). Thus the Board apparently would have regarded as an unfair labor practice inducement of a refusal to load the trucks with goods for Di Giorgio, as contrasted with inducement of a refusal to deliver the goods after they were loaded. We see no difference in the quality of the conduct involved in these two situations. True, a good union man might feel less reluctance in loading the goods upon the truck than in actually delivering them to the struck premises, but there is no difference either in the quality of the two acts or in the quality of the refusal to perform them; as for the sensibilities of a good union man, Congress has seen fit to protect them only in the circumstances set forth in the proviso which we have mentioned (see page 7, *supra*, note 2).

In other cases, now pending in this Court, the Board has held inducement of a refusal to perform services at "the situs of the primary dispute" to be unlawful. See *International Brotherhood of Electrical Workers, etc. v. National Labor Relations Board*, No. 108, this Term; *National Labor Relations Board v. Denver Building and Construction Trades Council*, No. 393, this Term; *United Brotherhood of Carpenters v. National Labor Relations Board*, No. 85, this Term. In each of these cases a union having a dispute with a subcontractor on a construction job induced employees of the general contractor or of other subcontractors to cease work on the job. In each instance, as here, the refusal to perform services occurred at the "situs of the primary dispute." The only apparent difference between those cases and the present is that in those cases the prem-

ises constituting the "situs of the primary dispute" were not owned by the primary employer (the subcontractor), whereas in the present case the primary employer is the owner.

In still another geographical situation, the Board has held both ways. Where pickets followed the trucks of an employer with whom their union had a dispute to the premises of another employer and there engaged in picketing, the Board held in one case[12] that this conduct violated Section 8(b)(4)(A), but held in another case[13] that it did not.

The Board's decisions cannot be fitted to the language of the statute. Nor can they be fitted to any other pattern. They are as varied as are different men's notions of what constitutes a secondary boycott.

VI. The Existence of a Right to Picket Does Not Mean That the Pickets May Properly Engage in Unlawful Conduct.

In its petition for certiorari, the Board spoke as if the question was whether picketing is prohibited in the circumstances of the present case. But that, as we have already noted (*supra*, pp. 5-6), is not the question. We are here concerned, not simply with picketing, but with conduct on the part of the pickets of which the sole purpose was to induce a refusal of service by employees of a neutral employer.

The existence of a right to picket does not mean that the pickets may properly engage in whatever conduct they may choose. If they resort to violence, then their conduct is tortious and, furthermore, constitutes coercion in violation of Section 8(b)(1) of the Act. Similarly, if they do not confine themselves to inducement of strike action by em-

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[12] *Matter of Sealright Pacific Ltd.*, 82 NLRB 271.

[13] *Matter of Teamsters' Union*, 87 NLRB No. 82.

ployees of the primary employer, but seek also to induce a refusal of service by employees of a neutral employer, then their conduct violates Section 8(b)(4)(A) and (B). The fact that the encouragement or inducement of a refusal of service is practiced through pickets rather than through some other medium does not sanctify such conduct; the case is no different than if the inducement was accomplished by fines and threats of fines as in the *Di Giorgio* case.

We do not mean to say that so-called primary picketing itself would never under any circumstances violate Section 8(b)(4)(A) or (B). On the contrary, in some circumstances it would do so. Where picketing is inextricably mixed with violence, the picketing itself may be tortious and enjoinable. *Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies, Inc.*, 312 U.S. 287. Similarly, where the picketing inextricably mixes lawful inducement of strike action by employees of the primary employer with unlawful inducement of refusals of service by employees of neutral employers, the picketing itself may violate Section 8(b)(4)(A) or (B). It apparently was this sort of situation that Congress had in mind in prohibiting the conduct specified where "*an* object thereof" (emphasis supplied) is one declared to be unlawful.[14]

However, be the foregoing as it may, we submit that

[14] "Section 8(b)(4), relating to illegal strikes and boycotts, was amended in conference by striking out the words 'for the purpose of' and inserting the clause 'where an object thereof is.' Obviously the intent of the conferees was to close any loophole which would prevent the Board from being blocked in giving relief against such illegal activities simply because one of the purposes of such strikes might have been lawful. • • •" (Supplementary Analysis by Senator Taft; 93 Cong. Rec. 6859).

when, as here, a union, through its pickets, engages in conduct which the Act in plain terms prohibits, that conduct, if not the picketing itself, constitutes an unfair labor practice.

CONCLUSION

We respectfully submit that the Board was wrong and that the decision of the Court of Appeals should be affirmed.

Dated: San Francisco, California, February 15, 1951.

HERMAN PHLEGER
GREGORY A. HARRISON
MARION B. PLANT
Attorneys for Di Giorgio Fruit Corporation as Amicus Curiae.

Due service and receipt of a copy of the within is hereby admitted this ____ day of February, 1950, and consent is hereby given that the within be filed.

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Solicitor General

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Associate General Counsel
National Labor Relations Board

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Attorneys for Respondents